IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

vs.

NATIONAL MEDIATION BOARD
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Petitioner, Sedalia-Marshall-Boonville Stage Line, Inc. [SMB], petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit entered in this case on March 29, 1978.

OPINIONS BELOW

The order and judgment of the United States District Court for the Southern District of Iowa (App. A, B) are not officially reported. Jurisdiction of the District Court was conferred by

28 U.S.C. §§ 1331, 1337. The opinion and judgment of the Court of Appeals, reported at 574 F.2d 394 (8th Cir., 1978), 97 LRRM 3224 (1978), are set forth in Appendices C and D.

JURISDICTION

Jurisdiction of this Court to review, by writ of certiorari, the judgment and decision of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. Whether Petitioner, an air carrier, having alleged and submitted evidence of the National Mediation Board's failure to investigate a representation dispute under the Railway Labor Act, is subject to summary dismissal of its claims of the Agency's violations of express statutory duties, without discovery or trial on the merits, on the ground that no "gross violation" was established?

II. Whether Petitioner, an air carrier, given no notice of eligibility issues respecting dispositive disenfranchised voters, no opportunity to be heard thereon, and no factual basis for their exclusion, is entitled to the minimal rights of notice and the opportunity to be heard under the Due Process Clause of the Fifth Amendment to the United States Constitution in National Mediation Board representation proceedings?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution is set forth in Appendix E-1.

The pertinent provisions of the Railway Labor Act, as amended, 48 Stat. 1188, 45 U.S.C. §151 *et seq.*, are set forth in Appendix E-2.

STATEMENT OF THE CASE

Petitioner, a Des Moines, Iowa, air carrier, is engaged in the interstate transportation of mail, freight and passengers. (R. 3).[1]

On January 26, 1976, the National Mediation Board, [NMB], informed Petitioner, [SMB], of the Union's application for a representation election under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. (R. 53). SMB has never objected to the appropriateness of the voting unit—the craft or class of pilots and copilots. SMB cooperated with the NMB by submitting lists of its pilots and copilots and providing information respecting the duties of three employees inquired about by the NMB. (R. 53-54). It is *undisputed* that SMB was never notified prior to the NMB's certification of the Union that the voting eligibility of three other employees, Barber, Milner or Worden, who were included on the voting eligibility lists but who were disenfranchised by the NMB, was challenged or in dispute. (R. 9, 54-55).

The mail ballot election and the investigation, according to the NMB, were closed on March 29, 1976. (R. 37). On April 5, 1976, SMB first learned that nine employees had been excluded from the voting eligibility list, and two were added. (R. 54). The next day, SMB sent a telegram to the NMB, protesting the election on the grounds that eligible employees were disenfranchised and an ineligible former employee (Shaw) was permitted to vote, without notice to SMB or opportunity to

[1] "R" references are to the appendix filed in the Court of Appeals.

be heard. (R. 36). On April 7, 1976, the NMB informed SMB "your telegram was not timely received by the Board" and that under its rules "a carrier does not have party standing in a representation dispute." The same day the Union was certified as the exclusive collective bargaining representative by a *one vote margin*. (R. 37-39).

Petitioner promptly filed a written application with the NMB, requesting a vacation of the certification and an investigation of voting eligibility of excluded employees Barber, Milner, Reeves and Worden, and of former employee Shaw, setting forth specific supporting facts. (R. 40-43). On May 7, 1976, the NMB Executive Secretary Quinn wrote SMB that the Agency denied the application in "executive session", determined that the four employees had been properly excluded, and that Shaw's initially erroneous inclusion "does not materially change the outcome of the election since Shaw did not tender a ballot." (R. 47).

Attempting to determine whether there was the required investigation of voter eligibility issues, SMB submitted requests to the NMB under the Freedom of Information Act, 5 U.S.C. § 552. (R. 56-59). The NMB responded that there were no written statements regarding any employee's eligibility, and it refused to produce any written materials from its mediator assigned to the case or legal authorities upon which it relied. (R. 59-60). Four months after its initial request, SMB received the minutes of the Agency's "executive session", reflecting its brief conclusions on dispositive voter eligibility issues. (R. 66).

Petitioner's complaint in the United States District Court for the Southern District of Iowa set forth three distinct claims: (1) that the NMB violated its statutory duty to investigate issues of dispositive voters' eligibility, as required by 45 U.S.C. § 152, Ninth; (2) that the NMB, in violation of its duty under 45 U.S.C. § 152, Fourth of the Act, certified the Union as the

representative of a majority of SMB's employees; and (3) that the Agency denied Petitioner minimum procedural due process rights guaranteed by the Fifth Amendment to the United States Constitution. (R. 3-8). Petitioner, *inter alia*, prayed for an order vacating the certification and ordering a new election. The Agency's answer *admitted* that "no prior notice was given to [SMB] of the possible issue, dispute, challenge to or investigation of the voting eligibility of Wilbur Barber, Bill Milner and Blaine Worden" and *admitted* that SMB's protests and requests for an opportunity to be heard were "summarily denied." (R. 9).

Petitioner propounded written interrogatories to the NMB, pursuant to Fed. R. Civ. P. 31, again seeking to determine if any investigation occurred. (R. 13-23). After the NMB's four-month refusal to answer, the District Court granted the NMB's motion for a protective order, staying *all* discovery. (R. 91).

On June 22, 1977, the District Court granted the motions for summary judgment of the Agency and the Union. The Court held, citing *Brotherhood of Railway & Steamship Clerks v. Assn. For the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), that SMB "does have standing" to assert claims that the NMB failed to perform its statutory duty to investigate a representation dispute, noting that SMB "raises this precise question with regard to the facts of this case." (App. A, p. A-5). However, the Court concluded that "the record fails to reveal any gross violation" of the NMB's duty to investigate, finding that the NMB mediator sought information from SMB on "certain employees" and "in any event, the NMB considered [SMB's] claim that certain persons should be entitled to vote and rejected it." Thus, the Court reasoned, SMB "has no standing to raise the issues relating to these actions and decisions, and therefore no constitutional right to procedural due process in the Board's determination." The Court was "not satisfied with the result", saying that "had standing been shown, serious due process questions would have been presented." It characterized

the NMB's procedures as "out of tune with the realities of modern day labor—management relationship and current due process concepts", and invited the appellate courts to "remove this anachronism." (App. A, p. A-6).

A panel of the United States Court of Appeals for the Eighth Circuit affirmed. The Court concluded that, "on this record", the NMB performed its statutory duty to investigate voting eligibility issues, finding that its mediator communicated with SMB respecting three employees[2], and NMB "did consider some of SMB's proffered evidence" after the election. The Court "share[d] the same concerns expressed by Judge Stuart" and asserted "it is unfortunate that the statutes, and the cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort." (App. C, p. A-19).

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[2] SMB asserted the lack of investigation respecting one of these three—Reeves. However, it is undisputed on the pleadings and record that the NMB *never* notified SMB prior to the certification that the eligibility status of Barber, Milner or Worden was even in dispute, and there is *no evidence* in the record that their status was investigated, other than the NMB's May 7, 1976 conclusory letter confirming their exclusion.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Eighth Circuit Respecting the NMB's Statutory Duty to Investigate a Representation Dispute Presents Substantial Federal Questions Under the Decisions of This Court.

An air carrier's bargaining obligations under the Railway Labor Act [RLA] and the statutory sanctions for their enforcement are varied and severe. An NMB certification requires the carrier to negotiate with the union and to refrain from unilaterally changing its employees' wages, hours and conditions of employment. 45 U.S.C. § 152, Seventh and Ninth. Such obligations are judicially enforceable in an original action by the certified union. *Virginian Ry. Co. v. System Federation*, 300 U.S. 515 (1937). Criminal fines and imprisonment are also available for violations of such duties. 45 U.S.C. § 152, Tenth. Moreover, the Civil Aeronautics Board, under the Federal Aviation Act, 72 Stat. 754, 49 U.S.C. § 1371 (k)(4), compels compliance with the RLA as a condition for holding a certificate of public convenience and necessity.[3]

These statutory duties and penalties, all of which now face this Petitioner,[4] plainly establish its standing to assert statutory violations by the Agency, under the decisions of this Court.[5]

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[3] The National Labor Relations Act [NLRA], 49 Stat. 453, 29 U.S.C. §§158(a)(5), 160, provides only that an employer's unlawful refusal to bargain is remedied through a National Labor Relations Board administrative proceeding followed by judicial enforcement of its bargaining order.

[4] The District Court, relying on its decision herein, granted the Union's motion for partial summary judgment, ordering Petitioner to negotiate, in *Teamsters v. SMB*, No. 76-325-2 (S.D. Iowa 1978), app. pending, No. 78-1178 (8th Cir.). (App. F).

[5] *See e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *U.S. v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Whether or not the RLA or the Agency's rules afford a carrier "party" status in the NMB proceedings, Petitioner's interest in a lawful investigation and election—the conditions necessary for a valid certification and Petitioner's continuing bargaining obligations—is obvious. An unlawful investigation has resulted in actual or threatened injury to this Petitioner. Petitioner "should not be required to wait and undergo a criminal prosecution as the sole means of seeking relief." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976).

In *Virginian Ry. Co., supra*, the Court stated that "the freedom of choice of representatives [is] an essential of the statutory scheme" and that the NMB has the "duty" to "investigate the dispute." 300 U.S. at 543-44. The Court noted that the RLA is "aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them." 300 U.S. at 548. Significantly, the Court added that the "ultimate conclusion" of an NMB certification must be supported by "basic facts", including "the number of eligible voters", and such basic facts are "open to inquiry by the court asked to enforce the command of the statute." 300 U.S. at 562.

The District Court held that Petitioner had standing to assert the NMB's violation of its "statutory command" to investigate the "basic facts" critical to this Union's majority status and to this Petitioner's duty to bargain: the eligibility status of dispositive voters. The District Court had subject matter jurisdiction to adjudicate Petitioner's suit on the merits.

In *Brotherhood of Railway & Steamship Clerks v. Assn. for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), this Court emphasized that NMB actions in representation cases are judicially reviewable to determine "whether it performed its statutory duty to 'investigate' the dispute." 380 U.S. at 661. The District Court herein concluded that SMB "raises this pre-

cise question with regard to the facts of this case." (App. A, p. A-5). In *Railway Clerks*, United Airlines had participated in "lengthy hearings" before the NMB and had an "extended exchange of correspondence" with the NMB respecting the bargaining unit over a period of *15 years*. "In light of this background", the Court held, United was not entitled to a "full-dress hearing" and the NMB's procedures were found to comply with its statutory duty. The factual setting in *Railway Clerks* is a stark contrast to the NMB's view of this Petitioner as a disinterested interloper, not entitled to any notice of dispositive voting eligibility issues or any opportunity to be heard thereon, and its one-sided, secretive proceedings herein.[6]

Leedom v. Kyne, 358 U.S. 184 (1958), also stands for the proposition that a federal court has original jurisdiction to review and remedy a violation of an agency's statutory duty in a representation case, even in the absence of a statutory provision granting judicial review. The *Leedom* Court distinguished *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943), where a divided plurality of the Court ruled that NMB craft or class bargaining unit decisions were not judicially reviewable, expressly reserving all constitutional questions. The Court in *Switchmen's* observed, however, that in instances where there was no remedy to enforce "statutory commands" of the RLA, resulting in "robb[ing] the Act of its vitality and thwart-[ing] its purpose", the courts have jurisdiction to entertain such actions. 320 U.S. at 300. The statutory purpose of assuring that a carrier's stringent bargaining obligations under a certification are lawfully grounded is thwarted by the Eighth Cir-

[6] The NMB gave Petitioner no indication that the voting eligibility of Barber, Milner or Worden was in issue, or that former employee Shaw would be added to the list, but the Agency had *ex parte* pre-election communications with the Union respecting Shaw. (R. 73). From the record it is impossible to determine, despite the Petitioner's repeated discovery efforts, whether Barber, Milner and Worden were declared ineligible to vote *before or after* the ballots were mailed or whether or not they were tendered ballots.

cuit's adherence to a "gross violation" standard necessary for review of NMB investigations.

The decisions of the Courts below were not required by the foregoing decisions of this Court. The fundamental error of the Eighth Circuit was its refusal to permit inquiry by the District Court into the basic facts of voter eligibility and the NMB's investigation of them. The "gross violation" test necessary to withstand a summary judgment motion has no support in this Court's decisions. It cannot be determined whether *any* "violation" occurred without discovery of the facts respecting the elusive investigation and a fully developed trial record.[7] The Courts below erroneously concluded that Petitioner was simply challenging the "quality and result" of the NMB's investigation. (App. A, p. A-5-6; App. C, p. A-15). As the Eighth Circuit found, this Court in *Railway Clerks, supra*, fully considered the carrier's claim and all the facts bearing on the Agency's investigation. (App. C, p. A-14-15).[8] As the Eighth Circuit found, this Petitioner asserted "no investigation had been made" as to three dispositive voters' eligibility. (App. C, p. A-9). The record consisted of Petitioner's affidavit, denying any notice or investigation of Barber, Milner and Worden, and the NMB's conclusory letter, referring generally to an "investigation." (R. 53-69, 44-48). There is no record that the NMB had any evidence from any source supporting the exclusion of these three employees. There was, at the very least, a genuine question of material

[7] Ironically, the Eighth Circuit was sufficiently disturbed and concerned by the NMB's post-election reversal of its eligibility determination on Shaw that it ordered the production of evidence from the bench (App. G), yet Petitioner was arbitrarily denied all discovery rights. *See* 4 MOORE'S FEDERAL PRACTICE §26.26; 8 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, Civil §§ 2035, 2037.

[8] *WES Chapter v. NMB*, 314 F.2d 235 (D.C. Cir. 1962), relied on by the Courts below, is readily distinguishable. There, the NMB "held a hearing" and "representatives of both [the Union] and the employer were present at the hearing." 314 F.2d at 237, n. 8.

fact respecting the disputed "investigation", sufficient to preclude summary judgment.[9]

The Courts below erroneously adjudicated Petitioner's rights without any proof or consideration of numerous crucial facts: What investigation did the NMB conduct? What facts were provided to the NMB respecting the duties of Barber, Milner and Worden? What "chief pilot duties" or "functionally distinct work" (the NMB's stated basis for their exclusion) did they perform? The Courts below could not determine if the NMB breached its statutory duty without a record showing whether the Agency had evidence of such basic facts. The NMB has admitted that it has no such evidence from any source. (R. 59). This Court should forthwith vacate the judgments below and remand the case for discovery and trial.[10]

The Eighth Circuit, condemning the NMB's "unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort", preferred the "protections afforded a noncarrier employer by the National Labor Relations Act." (App. C, p. A-19). Contrary to the Court's view, Petitioner has a remedy under well settled judicial principles, and need not look to Congress as its sole source of relief. The RLA and the NLRA both provide that the employer's bargaining duty arises upon designation of a union by a majority of employees, and each requires the NMB and NLRB, respectively, to "investigate" a representation dispute.[11] This Court, in both *Railway Clerks, supra*, and *Leedom*,

[9] *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *See* 6 MOORE'S FEDERAL PRACTICE ¶ 56.15 [1.-00], 56.15 [6]; 10 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, Civil § 2725.

[10] *Maggio v. Zeitz*, 333 U.S. 56, 77 (1947), (misapplication of controlling precedent, resulting in failure to consider essential facts, requires reversal and remand).

[11] 45 U.S.C. §152, Fourth and Ninth; 29 U.S.C. §§159 (a), (c). The NLRA does not require post-election hearings. *U. S. Rubber Co. v. NLRB*, 373 F.2d 602, 604 (5th Cir. 1967).

supra, upheld the standing of the employer, and the jurisdiction of the federal courts, to adjudicate the issue of these agencies' duties to comply with statutory commands. The rules of each agency specify that evidentiary hearings may be held on voter eligibility issues arising during their investigations, with participation by the employer.[12] The various courts of appeals have repeatedly held that the NLRB abused its discretion by arbitrarily refusing to conduct post-election hearings when challenges to dispositive voters' eligibility or objections to the election were supported by evidence.[13] This Petitioner presented evidence supporting the voting eligibility of the four disenfranchised employees and requested an opportunity to be heard, both of which the NMB summarily rejected. There is no rational basis in the provisions of the two statutes, in the rules of the two agencies, or in the decisions of the courts, "permit[ting] such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort." (App. c, p. A-19).

II. The Decision of the Eighth Circuit Respecting the NMB's Statutory Duty to Investigate Representation Disputes Presents an Irreconcilable Conflict With International In-Flight Catering Co., Ltd. v. NMB, 555 F.2d 712 (9th Cir. 1977).

In *International In-Flight Catering Co., Ltd. v. NMB*, — F. Supp. —, 92 LRRM 3553 (D. Hawaii 1976), the Court va-

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[12] 29 C.F.R. §102.69(c); 29 C.F.R. §1202.8.

[13] *E.g., Beaird-Poulan Div., Emerson Electric Co. v. NLRB*, 571 F.2d 432 (8th Cir. 1978); *Firestone Textiles Co. v. NLRB*, 568 F.2d 499 (6th Cir. 1977); *NLRB v. Ortronix, Inc.*, 380 F.2d 737 (5th Cir. 1967); *U.S. Rubber Co. v. NLRB, supra*, note 11; *NLRB v. Capital Bakers, Inc.*, 351 F.2d 45 (3rd Cir. 1965); *NLRB v. Joclin Mfg. Co.*, 314 F.2d 627 (2d Cir. 1963). In *Beaird-Poulan, supra*, a panel of two of the three Judges deciding the present case noted that a post-election hearing on disputed facts was both a constitutional and statutory requirement.

cated the NMB's certification of the union,[14] holding it was "null, void and of no effect." The Court observed that:

> Section 2, Ninth of the RLA, 45 U.S.C. § 152 requires the NMB to conduct *an adequate and bona fide investigation* of each representation dispute it determines to exist and authorizes the NMB to issue a certification of representation only in those cases where its investigation establishes *competent evidence* that a majority of the employees in the craft or class have chosen or designated an individual organization to represent them for bargaining purposes. 92 LRRM at 3557, (emphasis added).

The Court found that the carrier presented information to the NMB showing that cards designating the Teamsters as the bargaining agent were represented to employees to be authorizations for an election, and that "the NMB has at all times refused to explain either to [the carrier] or to this court what investigation it conducted in this case." 92 LRRM at 3557.

The Ninth Circuit affirmed, 555 F.2d 712. Distinguishing *Switchmen's Union of North America, supra*, the Court stated that "reviewing whether the NMB made its statutory investigation at all" was within its jurisdiction. The Court pointed out that in *Railway Clerks, supra*, this Court ruled that the carrier's statutory claim "was reviewable." The Court conceded it was "undisputed that the NMB undertook some limited form of an 'investigation' " but noted that in the District Court "the NMB maintained a 'stonewall' approach to the investigation issue and failed to introduce any evidence whatsoever which disclosed the extent of their investigation, if any, other than a signature check of the cards." The Court held "it is not unreasonable to conclude that there was no investigation." 555 F.2d

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[14] While the certification was based on authorization cards, rather than an election, the NMB has such authority. 45 U.S.C. §152, Fourth. *cf., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595-600 (1969).

at 718. Regarding the NMB's "adamant and unyielding stance" in refusing to present evidence of its investigation, the Court observed that a government agency, as any other litigant, "cannot dictate which rules it will obey and which it will disregard." 555 F.2d at 720.

The actions and posture of the NMB in the instant case parallel its stance in *In-Flight*. In each case, the carrier's protest to the Teamsters' certification and request for an investigation were rejected out of hand. In each case, the Agency "stonewalled", refusing to produce competent evidence establishing an adequate and bona fide investigation. The Ninth Circuit held that "some limited form of 'investigation' " did not fulfill the NMB's statutory responsibility, but here the Courts below rubber-stamped the exclusion of three voters (Barber, Milner and Reeves) on the conclusionary basis that "they perform functionally distinct work activities," and the exclusion of the fourth (Worden) on the mistaken notion the carrier was making a "post-election challenge" to another employee (Wold), previously included on the carrier's list. (App. C, p. A-15-16).[15]

That the NMB sought information from Petitioner relative to several non-dispositive voters and claimed to consider SMB's proferred evidence (App. A, p. A-5; App. C, p. A-15-16) would not satisfy the Ninth Circuit's statutory investigation standard. The NMB, in other cases, has frequently upheld the voting eligibility of employees temporarily on leave or with some non-pilot work activities.[16] Such individual eligibility issues necessarily require an investigation of all the facts regarding the employment relationship.[17] Whether the NMB undertook such an

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[15] Petitioner did not "challenge" Wold; it contended that both Worden (disenfranchised) and Wold (permitted to vote) were *both eligible* because they were on the same temporary medical leave status and included on the list of eligible voters. (R. 42).

[16] 2 CCH LabL.Rep. ¶2595.715, .73, .741, .781. (NMB decisions are not officially reported.)

[17] *NLRB v. United Insurance Co. of America, Inc.*, 390 U.S. 254 (1968).

investigation is not disclosed by the record. The Courts below erroneously believed they were forbidden by this Court from determining if such an investigation occurred.

The decision of the Eighth Circuit simply cannot be reconciled with *In-Flight*. There was no "adequate and bona fide investigation" of dispositive voter eligibility issues by the NMB. There was no "competent evidence" justifying the Agency's clandestine restructuring of the voting eligibility list or its subsequent reaffirmation of voter exclusions in "executive session". This absence of essential evidence was due to the NMB's "stonewalling" of this Petitioner and the District Court, and to the tolerance by the Eighth Circuit of the NMB's "adamant and unyielding stance." This case presents an equally "egregious set of circumstances," to use the Eighth Circuit's description of *In-Flight, supra*. (App. C, p. A-16). The present irreconcilable conflict in the courts of appeals respecting a significant question of federal law requires a definitive decision of this Court.

III. The Decision of the Eighth Circuit That Petitioner, in the Circumstances of This Case, Was Entitled to No Procedural Due Process in the NMB's Proceedings Presents Substantial Questions of Constitutional Law.

The District Court recognized "serious due process questions", but because that Court summarily dismissed Petitioner's statutory claims, finding no "gross violation" by the NMB, it concluded Petitioner had "no constitutional right to procedural due process in the Board's determination." (App. A, p. A-6). The Eighth Circuit correctly found that Petitioner's due process claim challenged the lack of notice of dispositive voter eligibility issues and the opportunity "to present evidence regarding those persons who were excluded." It upheld the dismissal of Petitioner's constitutional claim on the basis that the RLA and *Railway Clerks, supra*, did not grant a carrier "party"

status in NMB representation proceedings or mandate that the Agency hold a "hearing." (App. C, pp. A-18-19).

The summary dismissal of Petitioner's constitutional claim was not required by the RLA or the decisions of this Court. Petitioner does not seek the "full panoply of procedural protections", *Railway Clerks, supra,* at 667, but merely its right to the minimal procedural due process guarantees of notice and the opportunity to be heard during the Agency's representation proceedings. Admittedly, the RLA does not require a formal, full-dress hearing on representation disputes, but no federal administrative agency can extinguish Petitioner's fundamental Fifth Amendment rights. In *Railway Clerks, supra,* the carrier participated for fifteen years in the NMB's craft or class investigation, and this Court held that no further "hearing" was required. However, this Court has recognized that adjudicative fact-finding proceedings, (*e.g.*, the determination of individual employees voting eligibility herein), require greater procedural safeguards than legislative or rule-making decisions of general applicability, (*e.g.*, the determination of an appropriate craft or class in *Switchmen's Union of North America, supra,* or *Railway Clerks, supra*).[18] Here, Petitioner's liberty and property interests, described in Part I above, were abridged by the NMB's telegram, "executive session" and conclusory letter, with no pretense of allowing SMB the measure of notice and opportunity to be heard the carrier had received in *Railway Clerks, supra.* Here the manner in which the Board has discharged its function cannot be characterized as "fair" or "equitable" and the results, as indicated by the opinions of the Courts below, are anything but "admirable." *See Railway Clerks, supra* at 668.

This Court has spoken forcefully of the importance of procedural due process in government proceedings. "The history

[18] *Bi-Metallic Investment Co. v. Board of Equalization,* 239 U.S. 441 (1915); *Escalara v. New York City Housing Authority,* 425 F.2d 853 (2d Cir. 1970), *cert.denied,* 400 U.S. 853 (1970).

of liberty has largely been the history of observance of procedural safeguards." *McNabb v. U. S.,* 318 U.S. 332, 347 (1943).

> Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied . . . [due process] is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration. *Shaughnessy v. U. S. ex rel. Mezei,* 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting).

"[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a plaintiff's substantive assertions," and because of "the importance to organized society that procedural due process be observed," damages are recoverable for its denial even without proof of actual injury. *Carey v. Piphus,* — U.S. —, 55 L.Ed.2d 252, 98 S.Ct. — (1978).

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170-172 (1951), Mr. Justice Frankfurter discussed the significance of notice and the opportunity to be heard:

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights.
>
> * * * * * * *
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> No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important for a popular government, that justice has been done.

Specifically, due process requires notice reasonably calculated to inform interested persons of issues or allegations and the opportunity to present their evidence or objections. *Memphis Light, Gas and Water Div. v. Craft*, — U.S. —, 56 L.Ed. 2d 30, 98 S.Ct. — (1978). Moreover, as the Court in *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) stressed:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and *the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue* * * * This Court has been zealous to protect those rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. (emphasis added).

The decision maker must also set forth the reasons for its decision and the evidence it relied on. *Wichita Railroad & Light Co. v. Public Utilities Comm. of Kansas*, 260 U.S. 48, 57-59 (1922).

It is undisputed that Petitioner was given no notice during the "investigation", which the NMB closed on March 29, 1976, that nine employees would be deleted from the voting eligibility list, that two would be added, or that the voting eligibility of three employees was even disputed or under investigation. Petitioner, in jeopardy of serious statutory penalties (administrative, civil and criminal), immediately protested the certification and requested the NMB to investigate the facts respecting dispositive employees' eligibility when it learned of their exclusion. After no notice, the NMB, in a secret "executive session", rejected Petitioner's application with no reasoned statement of its investigation[19] or indication of the evidence relied on. The

[19] *E.g., Dunlop v. Bachowski*, 421 U.S. 560, 571-72 (1975).

Agency's failure to appraise Petitioner of the factual basis for its eligibility determinations or permit Petitioner to contest them is not simply procedural irregularity, it is a denial of due process of law.

This Court has said that NLRB procedures are "constrained by the Due Process Clause of the Fifth Amendment." *Int. Tel. & Tel. Corp. v. NLRB*, 419 U.S. 428, 448 (1975). The Court has recognized that minimal due process guarantees apply in parolee revocation proceedings, *Morrissey v. Brewer*, 408 U.S. 471 (1972); in student suspensions from public school, *Goss v. Lopez*, 419 U.S. 565 (1975); in teacher termination cases, *Board of Regents v. Roth*, 408 U.S. 564 (1972); in state garnishment proceedings, *Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969) and in the termination of a welfare recipient's benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970). Surely the statutory obligation of the NMB to investigate a representation dispute, coupled with Petitioner's substantial and continuing bargaining duties, the possibility of criminal penalties and even the loss of its authority to engage in commerce, and the fact that plenary judicial review of NMB certifications is not obtainable, demand that minimal procedural due process protections be recognized here. *See Hannah v. Larche*, 363 U.S. 420 (1960).

The Courts below, albeit reluctantly, permitted the NMB to "unilaterally and arbitrarily" impose the Union on this Petitioner "without a hearing of any sort", and upon an administrative proceeding totally "out of tune" with "current due process concepts." The Courts below granted this Agency an immunity from elementary constitutional strictures on the premise that this Court's decisions required them to do so. This Court must review the NMB's proceedings herein, so devoid of "fundamental fairness, shocking to the universal sense of justice," [*Betts v. Brady*, 316 U.S. 455, 462 (1942)], in light of the Court's settled due process holdings.

CONCLUSION

Petitioner does not propose to rewrite the Railway Labor Act or divest the National Mediation Board of necessary administrative discretion. The statute commands that an investigation of disputed issues in representation cases be conducted, and this Court has ruled that such investigations are judicially reviewable. In 1943, the Agency apparently believed judicial review was "profitable".[20] In 1965, when this Court last examined an NMB case, the Court's careful scrutiny of the facts established a lawful investigation. *Railway Clerks, supra.* This case presents a significant question: has this Court allowed the NMB such administrative *carte blanche* in its representation proceedings that it places the Agency beyond the constraints of the Due Process Clause of the Fifth Amendment? The Eighth Circuit's decision permits even "unilateral and arbitrary" proceedings to qualify as an "investigation" and pass constitutional muster.

This Court has consistently recognized that Government's respect for the fundamental guarantees of the Bill of Rights is essential to the preservation of ordered liberty. Mr. Justice Stewart, dissenting in *Railway Clerks, supra,* at 672, 677, cautioned that because NMB craft or class decisions were insulated from judicial review "makes it all the more imperative that the Board be required to operate by fair and lawful procedures" and he criticized the NMB's "mistaken belief that its duty is to encourage collective representation in the airline industry . . ." Since then, the NMB's representation procedures have been sharply attacked,[21] and both the Eighth and Ninth Circuits

[20] *Switchmen's Union of North America, supra,* at 319, n. 18 (dissenting opinion).

[21] Curtin, *The Representation Rights of Employees and Carriers: A Neglected Area Under the Railway Labor Act,* 35 J.Air L. & Com. 468 (1969).

have condemned the lack of fundamental fairness in NMB recent investigations. The dramatic increase in airline industry organizational activity[22] indicates that a re-examination of the Agency's anachronistic procedures in light of "current due process concepts" is overdue. The circumstances of this case compel such re-examination.

Because the Courts below misapplied applicable precedents of this Court, denying discovery and trial of essential facts indispensable to the determination of whether an investigation occurred, and denying Petitioner minimal procedural due process, this Court should vacate the judgment below and remand for a trial on the merits and an adjudication of the Petitioner's constitutional claim in light of the constraints of the Due Process Clause of the Fifth Amendment to the United States Constitution. In the alternative, it is submitted that the Court should grant this Petition for Writ of Certiorari on all questions presented.

Respectfully submitted,

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[22] The number of employees involved in 1976 NMB representation cases increased five-fold from 1975 and 83% were airline employees. NMB Forty-Second Ann.Rep. 28 (1976).

APPENDIX

APPENDIX A

Opinion of the
United States District Court for the
Southern District of Iowa

In the United States District Court
Southern District of Iowa
Central Division

Sedalia-Marshall-Booneville Stage Line, Inc.,
Plaintiff,
vs.
National Mediation Board,
Defendant,
and
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Intervenor.

Civil No. 76-180-1

ORDER

(Filed January 22, 1977)

This is an action brought under the provisions of the Railway Labor Act, 45 U.S.C. §§ 151, et seq., by plaintiff Sedalia-Marshall-Boonville Stage Line, Inc. (SMB) against defendant National Mediation Board (NMB or Board), an agency of the Federal Government. The International Brotherhood of Teamsters has been permitted to intervene as a defendant. Now

before the Court are defendant's motion to dismiss or for summary judgment, filed January 17, 1977, and the intervenor's motion for summary judgment, filed February 28, 1977. Plaintiff has resisted both motions and the matter came on for hearing before the Court on April 22, 1977. For reasons stated below, the Court is of the opinion that the pending motions must be granted.

Plaintiff, SMB, is a "carrier" within the meaning of the Railway Labor Act and is thus regulated by its provisions. In January, 1976, plaintiff was informed by the NMB that the Airline Division of the Teamsters had filed an application under Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, for investigation of a representation dispute among plaintiff's employees classified as pilots or co-pilots. Pursuant to defendant's request, plaintiff submitted to the NMB mediator an original, and subsequently revised, list of names of pilots and co-pilots within its employ. On March 5, 1976 the NMB found a dispute to exist among the employees in the craft or class and authorized a mail ballot election. After tabulation of votes based upon its determination of the proper electorate, the NMB informed plaintiff that of fifty-nine eligible employee voters, thirty had cast votes in favor of the Union.

On April 6, 1976, plaintiff protested the election to the NMB on the grounds that eligible employees were not permitted to vote and that an ineligible former employee had been permitted to do so. Plaintiff also requested an opportunity to present evidence and argument. However, the Board promptly overruled the protest as untimely and certified the Teamsters as the duly authorized representative of plaintiff's employees. The Board also noted the carrier's lack of party status in a representation dispute as a further reason for denying the protest.

Thereafter on April 14, 1976, plaintiff filed an application to vacate the certification and for a formal evidentiary hearing based on certain allegedly incorrect determinations of voter

eligibility, which were specified by the plaintiff. On May 7, 1976, the Board denied this application again citing plaintiff's lack of party status to a representational dispute, but further determined that at any rate, all contested employees had been correctly excluded from the eligibility list.

Plaintiff's complaint and application for injunctive relief alleges separate claims in three divisions: (1) that the NMB failed to comply with its statutory duty set forth in 45 U.S.C. § 152, Ninth to investigate issues of voting eligibility arising during the course of a representational dispute; (2) that as a result the NMB in violation of its duty under 45 U.S.C. § 152, Fourth, certified the Teamsters as representative of a majority of plaintiff's pilots and co-pilots; and (3) that the actions and conduct of defendant denied plaintiff procedural due process rights guaranteed under the Fifth Amendment of the Constitution. Plaintiff prays for an Order of this Court restraining the enforcement of the NMB's certification of the Teamsters, for a determination of the voting eligibility of certain employees, and/or for an Order directing the NMB to permit plaintiff to present evidence and argument thereon and to conduct a new election. The NMB denies that it failed to investigate as alleged, that its certification was improper, or that it violated plaintiff's constitutional rights. It does admit that no prior notice was given plaintiff of its action in disqualifying plaintiff's employees, Wilbur Barber, Bill Milner, and Blaine Worden.

Defendant and defendant-intervenor seek to dismiss this action arguing that plaintiff lacks standing to maintain the same, and because the Court is without jurisdiction over the subject matter.

The major objective of the Railway Labor Act was "the avoidance of industrial strife, by conference between the authorized representatives of employer and employee". Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 547. It

gives to employees the right to organize and bargain collectively through a representative of their own selection, doing away with company interference. *Id.* at 543. Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, establishes the process for selection of the employees' representative. It is therein provided that the National Mediation Board shall, upon request, "investigate" representative disputes and certify the authorized representative to the disputants and the carrier. Upon receipt of the Board's certification, the carrier is required to "treat with" the certified representative as the representative of the designated craft or class. In conducting its statutorily prescribed investigation, the Board is authorized to take a secret ballot or utilize any other appropriate method of ascertaining the choice of the employees. Furthermore, § 162 Ninth states that "[i]n the conduct of any election for the purposes herein indicated the Board shall designate who may participate and establish rules to govern the election * * *".

JURISDICTION

It is clear that the court's jurisdiction in reviewing employee representation proceedings under the Act is extremely limited. Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943); Railway Clerks v. Employee's Assn., 380 U.S. 650 (1965). Judicial intervention, however, is permissible to consider an allegation that the Board has ignored an express command of the Act. See Leedom v. Kyne, 358 U.S. 184 (1958). The assertion of such jurisdiction must be confined to instances of constitutional dimension or gross violation of the statute, "where the error on the merits is as obvious on the face of the papers as the violation of specific statutory language * * *". Teamsters v. Railway, Airline, and Steamship Clerks, 402 F. 2d 196 (D.C. Cir., 1968). As stated by the Court in Railway Clerks, supra, "[w]e think that the

Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute". 380 U.S. at 661. Plaintiff raises this precise question with regard to the facts of this case. The Court holds that plaintiff does have standing to raise this issue, Railway Clerks, supra, 380 U.S. at 660; International In-Flight Catering Co. v. NMB, ... F. 2d ... (9th Cir., decided June 10, 1977); however, the Court is of the opinion that the record fails to reveal any gross violation of the Board's express obligation under the Act to investigate representative disputes, The NMB's actions in International In-Flight Catering Co. were clearly beyond its statutory authority. Such is not the case here.

The Board's duty to investigate is a duty to make such investigation as the nature of the case requires. *Railway Clerks*, supra at 662. An investigation is essentially informal, not adversary, and is not required to take any particular form. *Id.* These principles are particularly apt, the Court stated, "where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case". *Id.* Here, the Board assigned mediator Edward F. Hampton to commence investigation of the SMB case. Hampton requested and obtained from plaintiff's executive vice-president, Robert Grammer, lists of employees within the designated class of pilots and co-pilots, discussed with Grammer the eligibility status of certain employees, and solicited information concerning certain employees work assignments and duties. An election was then held, the result ascertained, and the Board authorized a bargaining representative. Clearly, an "investigation" of the dispute, sufficient to preclude the finding of a gross statutory violation or of an ignorance of an express command of the Act, was undertaken. See Aeronautical Radio, Inc. v. National Mediation Board, 380 F. 2d 624 (D.C. Cir., 1967). Plaintiff appears to be challenging the quality and result of that investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility

made by the Board. Such judgments, however, are committed to Board discretion, and are not within the permissible ambit of judicial review. See WES Chapter v. National Mediation Board, 314 F. 2d 235 (D.C. Cir., 1962); Decker v. Venezolana, 258 F. 2d 153 (D.C. Cir., 1958). Consequently plaintiff has no standing to raise the issues relating to these actions and decisions, and therefore has no constitutional right to procedural due process in the Board's determination. In any event, the NMB considered plaintiff's claim that certain persons should be entitled to vote and rejected it. The Court cannot interfere with that decision.

The Court is not satisfied with the result it feels compelled to reach under the authorities. Defendants state that at the present time we are not "in tune" with the circumstances existing when the Railway Labor Act created the NMB. I believe it is more accurate to state that NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts. Had standing been shown, serious due process questions would have been presented. Perhaps Congress or the appellate courts will take steps to remove this anachronism. See the chastisement of the NMB in International In-Flight Catering Co., Ltd. v. National Mediation Board, decided by the Ninth Circuit June 10, 1977.

IT IS THEREFORE ORDERED that the defendant and defendant-intervenor's motions for summary judgment shall be granted.

Signed this 22 day of June, 1977.

W. C. STUART
U. S. District Judge
Southern District of Iowa

APPENDIX B

Judgment of the District Court

United States District Court
for the
Southern District of Iowa—Central Division

Sedalia-Marshall-Booneville Stage Line, Inc.,

vs.

National Mediation Board, Defendant, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervenor.

Civil Action File No. 76-180-1

JUDGMENT

(Filed June 22, 1977)

This action came on for hearing before the Court, Honorable William C. Stuart, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant, National Mediation Board, and defendant-intervenor's motions for summary judgment be and are hereby granted.

Dated at Des Moines, Iowa, this 22nd day of June, 1977.

FRED O. MORROW
Acting Clerk of Court

APPENDIX C

Opinion of the United States Court of Appeals for the Eighth Circuit

United States Court of Appeals
for the Eighth Circuit

No. 77-1606

Sedalia-Marshall-Boonville Stage Line, Inc.,
Appellant,
v.
National Mediation Board,
Appellee,
and
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 11, 1978

Filed: March 29, 1978

Before Gibson, Chief Judge, Van Oosterhout, Senior Circuit Judge, and Ross, Circuit Judge.

ROSS, Circuit Judge.

Sedalia-Marshall-Boonville Stage Line, Inc. (hereinafter SMB), an air carrier, appeals from an adverse decision of the

district court dismissing its complaint on a summary judgment motion, FED. R. CIV. P. 56. The case arose under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, wherein SMB challenged the decision of the National Mediation Board, a government agency, to certify the International Brotherhood of Teamsters as the bargaining representative of SMB's employees.

In January 1976 the Teamsters filed an application with the Board seeking to become the labor representative of SMB's pilots and co-pilots. In a subsequent election in March 1976 the Teamsters, according to the Board, won the right to represent these employees, with the union receiving 30 votes among the 58 eligible voters.[1]

In general terms, SMB has disagreed with the Board on who was eligible to vote in the representation election. By telegram to the Board on April 6, 1976, SMB protested the election results, contending that eligible employees had not been permitted to vote and that an ineligible former employee had voted; further SMB complained that these decisions were made without notice to the employer or an opportunity for the employer to be heard.

Specifically, SMB alleged that no *investigation* had been made by the Board as to the eligibility status of four named employees, and that no notice was given to SMB of a possible dispute concerning these employees' eligibility. After a summary rejection by the Board of the employer's complaints on April 7,

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[1] The ballots were printed with only two alternatives presented to the employees: 1) to vote for the Teamsters; and 2) to vote for another union to be written in. The failure to include a box for no union representation probably accounts for the fact that only 30 votes were cast; and in an election as close as this could, in our opinion, have made a difference in the outcome. However the Supreme Court has specifically approved this form of ballot in NMB elections. *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 668, 669 n. 5 (1965).

1976, and a renewal of the complaint by SMB in the form of an "Application to Vacate Certification and for Formal Evidentiary Hearing," the Board responded on May 7, 1976, with a letter from its Executive Secretary. The letter related the outcome of an executive session of the Board which reaffirmed that the excluded employees had been "correctly excluded" from voting; however, the Board admitted that one individual declared eligible by it, Shaw, should have been ineligible as SMB had alleged. The Board concluded that the error was harmless, however, since Shaw had not voted in the election anyway.[2] In the May 7 letter the Board also briefly gave a reason for excluding each of the four named individuals whom SMB had complained were erroneously declared ineligible.

As a legal matter, SMB's petition in the district court alleged that, based on the foregoing set of facts, the Board had: (1) failed to comply with § 152, Ninth of the Act by failing to investigate a representational dispute and issues of employee voting eligibility; (2) designated an organization as the employee representative which had not been lawfully authorized by a majority of a craft or class of employees in violation of § 152, Fourth of the Act; (3) denied SMB minimal due process rights under the fifth amendment.

The statute with which this case is primarily concerned is § 152, Ninth of the Railway Labor Act, which sets out the duties of the National Mediation Board when a contest over employee representation arises:

Section 152, Ninth:

> *Disputes as to identity of representatives; designation by Mediation Board; secret elections*

[2] According to an affidavit supplied by the Board pursuant to our request at oral argument, Shaw's elimination from eligibility reduced the number of eligible voters from 59 to 58. There still however were 30 votes for the union and the affiant certified that Shaw had not voted.

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, *it shall be the duty of the Mediation Board upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute*, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. *In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election.* The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph. (Emphasis added).

The district court concluded that its jurisdiction to review employee representation proceedings under the Act was limited to "instances of constitutional dimension or gross violation of the statute," further concluded that no such violation of the

statutory duty to "investigate" a representation dispute was present in this case, and granted defendant's summary judgment motion. The employer, SMB, appealed this holding, the holding that the employer had no procedural due process rights in the Board's eligibility determinations, and the granting of a protective order which had stayed discovery against the Board.

We affirm though we share the same concerns expressed by Judge Stuart in his opinion.[3]

The appellant's request that we invalidate the certification is based on two assertions of error: that the Board had failed to undertake an investigation to determine the eligible electorate, and that the Board had failed to include the employer as a participant in the Board's processes for defining the electorate. On the basis of *Brotherhood of Railway & Steamship Clerks v. Association For the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (hereinafter *Railway Clerks*) and other Supreme Court authority, we do not agree that the district court erred.

In *Railway Clerks, supra*, 380 U.S. 650, the Supreme Court set out the principles for evaluating a claim that a decision of the National Mediation Board was subject to judicial review. It is first clear that the Court considered judicial review to be sparing. Citing its earlier opinion, *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943),[4] the Court in *Railway Clerks, supra*, 380 U.S. at 659, first stated that § 152, Fourth of the Railway Labor Act had written into law the "right" of the majority of a class or craft of employees to choose who shall be their representative for purposes of the Act. Congress had determined to protect that "right" in § 152, Ninth of the Act which gave the Mediation Board the "power to resolve controversies" concerning representation. *Id.* The power to protect the employees' rights thus resided in the Board, not in the judiciary:

> Congress decided on the method which might be employed to protect this "right"; and that where Congress "has not expressly authorized judicial review," *Id.*, at 301, "this Court has often refused to furnish one even where questions of law might be involved," *Id.*, at 303. The Court's conclusion was that "the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."

Railway Clerks, supra, 380 U.S. at 659.

To these general principles of judicial nonreview, the Court added one limitation: judicial power may be exerted to require the Board to exercise a duty imposed under § 152, Ninth of the Act. *Railway Clerks, supra*, 380 U.S. at 661. "[T]he Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute." *Id.* (footnote omitted).

After a review of applicable "principles," the Court in *Railway Clerks* proceeded to consider, and reject, the employer's

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[3] Judge Stuart writes:

> The Court is not satisfied with the result it feels compelled to reach under the authorities. Defendants state that at the present time we are not "in tune" with the circumstances existing when the Railway Labor Act created the NMB. I believe it is more accurate to state that NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts. Had standing been shown, serious due process questions would have been presented. Perhaps Congress or the appellate courts will take steps to remove this anachronism. See the chastisement of the NMB in International In-Flight Catering Co., Ltd. v. National Mediation Board, decided by the Ninth Circuit June 10, 1977.

[4] In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300 (1943), it had been held that the court did not have the power to review a decision of the Board, objected to by a union, which designated all yardmen of the carriers in the New York Central System as participants in the same representation election.

assertion that the Board had failed to perform its statutory duty to investigate in making a class and craft designation for the employees; the employer had argued that the Board had made an arbitrary determination without taking evidence or making findings.

The statute admittedly required the Board to make an "investigation," but, the Court continued, "[t]his command is broad and sweeping." *Railway Clerks, supra,* 380 U.S. at 662. No particular kind of investigation is required in every case:

> We should note at the outset that the Board's duty to investigate is a duty to make *such investigation* as the *nature of the case requires.* An investigation is "essentially informal, not adversary"; *it is "not required to take any particular form."* (Footnote omitted).

Railway Clerks, supra, 380 U.S. at 662 (emphasis added). The Court then approved the sufficiency of the investigation that led to the Board's resolution of the class or craft question. The Board initially had chosen a unit that was "well-recognized" under prior Board determinations and had "proven satisfactory in actual experience." *Id.* at 665. The Court outlined the balance of the Board's preelection "investigation":

> The Board received the Brotherhood's application; it requested, received and considered statements from the carrier and the Machinists. On the basis of these preliminary actions, it scheduled an election. But it continued to correspond with United, accepting and studying its detailed application for reconsideration of the Board's decision to proceed to election in the R-1706 craft or class. Viewed alongside prior experience with the R-1706 grouping in the air transport industry this procedure clearly complied with the statutory command that the Board "investigate" the dispute. The only missing element of the

> required investigation is the election and that can now be held promptly.

Id. at 666.

Comparatively we cannot say on this record that the Board acted in excess of its powers or contrary to a statutory provision. The affidavit of the employer's vice-president, Robert Grammer, reveals evidence of the Board's investigation: the Board requested and received from SMB a list of 68 qualified pilots and co-pilots; the NMB Mediator Edward Hampton met with SMB legal counsel and Grammer to discuss the eligibility of two particular employees; subsequent to the meeting SMB submitted a revised list of eligible employees, omitting the two who had been discussed; pursuant to a later request by Mediator Hampton SMB submitted to the Board a letter explaining the work assignments and duties of three specified employees; finally prior to the election the Board notified SMB of the disqualification of two other employees.

Grammer's affidavit further stated, however, that the Board had not requested information from SMB about employees Barber, Milner or Worden, or informed SMB that their eligibility was contested.

Based on these facts admitted by SMB, we conclude that the Board did undertake to "investigate" the dispute and to designate who might participate in the election. We agree with the district court that "Plaintiff appears to be challenging the quality and result of that investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility made by the Board."

From a letter to SMB's counsel from the Board on May 7, 1976, referred to in SMB's complaint, and reprinted in full with the Board's summary judgment motion, it is clear that the Board had not failed to give consideration to Barber, Milner and Worden's eligibility:

During the course of investigation it became evident that Wilbur Barber functions as an assistant to the chief pilot and that he performs check pilot duties for the Carrier. Bill Milner also functions as an assistant to the chief pilot while James Reeves was identified in the Carrier's letter to Mediator Hampton dated March 18, 1976 as "an instructor and check pilot in the training department." All three (3) of these individuals were correctly excluded from the Mediator's finalized list of eligible voters since they perform functionally distinct work activities which would exclude them from the craft or class of Pilots and Co-Pilots.

Blaine Worden was excluded from the list of eligible voters because he performs non-pilot duties. Though the Carrier maintains that John Wold also performs non-pilot duties the Carrier failed to inform the Mediator of Wold's status and included Wold on the initial list of potential eligibles supplied to the Mediator. The Board must conclude that any post-election challenge to include John Wold on the list of eligible voters would not further the purposes of the Railway Labor Act as outlined under Section 2, therein.

Although we agree with the holding in *International In-Flight Cartering Co. v. National Mediation Board*, 555 F.2d 712 (9th Cir. 1977) urged in support of SMB's position, we do not think the facts here present the same egregious set of circumstances; there the Board's investigation prior to certifying the union consisted solely of comparing signatures on the "Request for Election" cards with signatures from the employer's payroll records, even though it was clear that the cards were requests for an election only and were not votes for representation without an election.

The present case is more like *WES Chapter v. National Mediation Board*, 314 F.2d 234 (D.C. Cir. 1962) where an eligi-

bility decision of the Board was challenged and the court declined review: "[T]he challenge by appellant does not go beyond asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory, including its rule-making, authority." *Id.* at 237.

We conclude that the Board did not abrogate a statutory duty in this case, and because sufficient facts to sustain this holding appear from SMB's filings, we will not consider the allegation that the district court erred in not enforcing discovery against the Board which sought information about the investigation.

SMB also claims that it was unconstitutionally excluded from participation in the Board's eligibility determinations, and that it should have been given timely notice of challenges to employee eligibility, plus a chance to present evidence regarding those persons who were excluded.

These procedural due process claims are adequately answered in *Railway Clerks, supra*, 380 U.S. 650. There, as here, the employer had argued:

> [T]hat since the Act compels it to treat with the representative chosen by the majority of its employees * * * it has a direct and substantial interest in the scope of that unit; and since the Act provides for no administrative or judicial review, due process requires that it be accorded an opportunity to participate in the proceedings by which the Board determines which employees may participate.

Id. at 660.

The Court answered first by saying that the Act does not require a hearing. (The Board itself may designate who participates or may appoint a committee of three neutral persons who

after a hearing shall designate the electroate.) *Railway Clerks, supra*, 380 U.S. at 666.

Secondly, the Court said:

> Nor does the Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. *Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board.*

Id. at 666-67 (emphasis added).

The Court pointed out that an employer is "under no compulsion to reach an agreement" with the Board-certified representative. Concerning the nature of the employer's alleged interest, the Court said:

> [W]hile the Board's investigation and resolution of a dispute in one craft or class rather than another might impose some additional burden upon the carrier, *we cannot say that the latter's interest rises to a status which requires the full panoply of procedural protections.*

Id. at 667 (emphasis added).

It is clear that the Board did consider some of SMB's proffered evidence in this case subsequent to the election, and in fact reversed its eligibility decision as to Shaw.

We conclude that the Board's eligibility decisions and election certification are not subject to further review; the Board has not violated a statutory duty in its conduct of the investigation; it has not failed to satisfy constitutional requirements be-

cause it did not further consult SMB or make SMB a party to the proceedings which designated the employee electorate.[5]

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[5] It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort. The protections afforded a noncarrier employer by the National Labor Relations Act are much to be preferred. But the responsibility to make that decision rests with Congress and not this court.

APPENDIX D

Judgment of the Court of Appeals

United States Court of Appeals
For the Eighth Circuit

No. 77-1606 September Term, 1977

Sedalia-Marshall-Boonville Stage Line, Inc.,

Appellant,

vs.

National Mediation Board,

Appellee,

and

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Appellee.

JUDGMENT

(Filed April 28, 1978)

Appeal from the United States District Court for the Southern District of Iowa.

This Cause came on to be heard on the record from the United States District Court for the Southern District of Iowa and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 29, 1978

(See attached sheet for cost information.)

A true copy.

Attest:

ROBERT C. TUCKER
Clerk, U.S. Court of Appeals,
8th Circuit

(Seal)

APPENDIX E

Constitutional Provisions Involved
Statutory Provisions Involved

APPENDIX E-1

CONSTITUTION OF THE UNITED STATES

Amendment V

* * * nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

APPENDIX E-2

Railway Labor Act, as Amended

45 U.S.C. § 151 *et seq.*

Section 1(a):

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly

> settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.
>
> * * *

Section 2, Fourth:

> Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions; *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.
>
> * * *

Section 2, Seventh:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.
>
> • • •

Section 2, Ninth.

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to goven the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies

> of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 2, Tenth:

> Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

APPENDIX F

Order of the District Court Granting Partial Summary Judgment in Civil No. 76-325-2

In the United States District Court, Southern District of Iowa, Central Division

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Plaintiffs,

vs.

Sedalia-Marshall-Boonville Stage Lines, Inc., Defendant.

Civil No. 76-325-2

ORDER

(Filed March 2, 1978)

The Court has before it plaintiffs' motion for partial summary judgment filed August 23, 1977. Defendant's resistance was filed September 15, 1977 and plaintiffs' reply on October 4, 1977. The original complaint was filed on behalf of the Union on October 18, 1976 pursuant to the provisions of the Railway Labor Act, 45 U.S.C. §§ 151 et seq. seeking to restrain the defendant (company) from engaging in allegedly unlawful conduct violative of its employees' rights and defendant's alleged duty to bargain in good faith. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1337.

Prior to the commencement of this action, however, defendant herein caused to be filed with this Court a related action, Sedalia-Marshall-Boonville Stage Lines, Inc. v. National Mediation Board, Civil No. 76-180-1 in which SMB sought to have the National Mediation Board (NMB) certification of the Union invalidated due to alleged defects in the NMB's investigatory procedures. This action (the certification action) was terminated when on June 22, 1977 this Court granted the Board's and Union's motions for summary judgment, in effect saying that the Court was without authority to review the quality and result of the Board's investigation which was found to clearly have been conducted.

SMB then sought a stay of the judgment in the certification action which was denied by Court Order on October 14, 1977. In the Union's motion for summary judgment currently pending in the instant action the Union is seeking this Court's affirmative injunction requiring the company to "treat with plaintiff International Union . . ."; to exert reasonable efforts to reach agreement concerning rates of pay, rules and working conditions; to settle all disputes and to establish, pursuant to agreement with its employees, a system board of adjustment for resolution of grievances and disputes. The Company, in resistance, asserts a number of alleged issues of material fact which it contends preclude summary judgment. As the Court views this resistance, however, any alleged factual disputes were issues contested in the previous certification action which were either resolved adversely to the Company's position or found to not be susceptible to review. The certification action is now on appeal to the Eighth Circuit Court of Appeals. The Court is of the opinion that such alleged factual issues cannot preclude summary judgment in this action if otherwise warranted. Although both parties request oral hearing, the Court believes that the prior hearing in the certification action gave ample opportunity for the parties to present their views.

Section 152 Ninth of the Act provides in pertinent part that:

> Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.

Section 152 First provides:

> It shall be the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

The obligation to exert reasonable efforts to make and maintain agreements is mandatory rather than hortatory and that such obligation is enforceable by the Courts. Chicago & N.W. Ry. v. United Transportation Union, 402 U.S. 570 (1971); Virginia R. System v. System Federation No. 40, 300 U.S. 515 (1937). The Supreme Court has unequivocally stated that

> The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.

Virginia R. System v. System Federation No. 40, supra at 548.

In the Court's opinion there exists no genuine issue of material fact which this Court may properly consider, and further the Court believes that plaintiff is entitled to summary judgment as a matter of law. The Court would note that to deny

summary judgment at this time would be, in effect, to grant the stay which was previously denied in the certification action. In addition to believing that summary judgment is warranted, the Court also remains convinced that denial of that stay was proper. As was previously indicated, if the Company desires that further action be stayed, application may be made to the Circuit Court of Appeals.

Finally as was noted previously the Court cannot force the parties to reach agreement. The Court can, and by this Order intends to insure that proper negotiations take place.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment shall be, and the same is hereby granted.

IT IS FURTHER ORDERED that Sedalia-Marshall-Boonville Stage Line shall be, and is hereby ordered to treat with plaintiff International Union as a representative of the craft or class composed of its pilots and co-pilots and to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions as is required by the Railway Labor Act, sections 151 et seq.

Signed this 2 day of March, 1978.

/s/ W. C. Stuart
Chief Judge
Southern District of Iowa

APPENDIX G

Post-Argument Submissions to the Court of Appeals

United States Department of Justice
Washington, D.C. 20530

January 12, 1978

Telephone:
FTS-739-3688

AGerson:lac
145-135-19
Mr. Robert C. Tucker
Clerk, United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, Missouri 63101

Re: Sedalia-Marshall-Boonville Stage Line, Inc. v. National Mediation Board and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (C.A. 8, No. 77-1606).

Dear Mr. Tucker:

Pursuant to the request of the court at yesterday's hearing of the above-captioned case that I furnish it with answers to the following questions: (1) the effect of the Board's disqualification of Shaw on the results of the National Mediation Board election, (2) whether the Board notified the Teamsters Union of the designated employee electorate prior to the election, and (3) whether the Board here notified the ineligible employees of that fact prior to the election, I am submitting herewith the

following statement for distribution to Judges Gibson, Ross and Van Oosterhaut.

1. In reply to the carrier's "Application to Vacate Certification and for Formal Evidentiary Hearing" the Board, in its letter of May 7, 1976 to Mr. John R. Phillips, counsel for the carrier, stated:

> With respect to the election conducted by the Board in Case No. R-4595, however, the question of William Shaw's eligibility does not materially change the outcome of the election since Shaw did not tender a ballot in the instant election. The count of ballots remains the same: 30 ballots for the International Brotherhood of Teamsters, Airline Division. The number of employees eligible to vote is revised downward to include 58 employees. Therefore, the results of the election are not materially altered and the Board's Certification issued on April 7, 1976, remains in force (Appendix, p. 47).

We note for the record that the argument that Shaw's subsequent disqualification affected the outcome of the election was never raised by the carrier in his petition to the National Mediation Board and in his complaint and brief in the district court. Nor was it raised in his opening and reply brief before this court.

2. The Board as a matter of practice generally notifies the labor organization or organizations seeking to represent the employees of the Board's designation of the employee electorate prior to conducting an election. *The Mediator's Representation Manual* (1973), Section 314(o). This is because they, unlike the employer-carrier, are parties to the Board's proceedings. As the Supreme Court held in *Brotherhood of Railway & Steamship Clerks, et al. v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), in the passage specifically quoted to the court in yesterday's proceedings: "This [party]

status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carrier's." *Id.* at 666. In this case, we are advised by the Board that neither the carrier nor the Teamsters Union was notified by the Board of the designated eligible employee electorate prior to the election.

3. The Board does not directly notify ineligible employees of the fact of their ineligibility. We are advised by the Board that its practice is to notify the employer of the date a mail-ballot election is to be conducted and is requested to post notices of such. Here SMB was notified by the Board on March 9, 1976 that a mail-ballot election would be conducted with the ballots to be returned to the NMB by March 29, 1976 (Appellant's brief, p. 10). Those employees who are determined to be eligible to vote are notified of this fact by receipt of a mailed ballot.

Yours very truly,

/s/ ALLAN GERSON
ALLAN GERSON
Attorney
Appellate Section,
Civil Division

Enclosures

cc: John R. Phillips, Esquire
510 Hubbell Building
Des Moines, Iowa 50309

Richard Wilder, Jr., Esquire
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

United States Court of Appeals
For the Eighth Circuit

Robert C. Tucker, Clerk

St. Louis, Mo. 63101

January 25, 1978

Mr. Allen Gerson
Attorney, Appellate Section
Civil Division
United States Department of Justice
Washington, D.C. 20530

Re: No. 77-1606. Sedalia-Marshall-Boonville Stage Line v. National Mediation Board, et al

Dear Sir:

We have been directed by the Court to advise you that the Court is not satisfied with your reply and that the Court wants to be advised in writing as to the first vote count and the second count after the disqualification of Shaw. Your response should show the vote for the Union and the vote for the company in each instance and it should be certified. We would appreciate receiving your response within the next ten days.

Very truly yours,

ROBERT C. TUCKER, Clerk
by:

Chief Deputy

dw

copy

Mr. John R. Phillips
510 Hubbell Building
Des Moines, Iowa 50309

Mr. Richard Wilder, Jr.
25 Louisiana Ave., N.W.
Washington, D.C. 20001

United States Department of Justice
Washington, D.C. 20530

February 6, 1978

AG:lac
145-135-19

Telephone:
FTS-739-3331

Mr. Robert C. Tucker
Clerk, United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, Missouri 63101

Re: Sedalia-Marshall-Boonville Stage Line v. National Mediation Board, et al. (C.A. 8, No. 77-1606).

Dear Mr. Tucker:

Pursuant to your letter of January 25, 1978, relative to the above-captioned case, I am enclosing for distribution to the Panel an affidavit of Rowland K. Quinn, Jr., Executive Secretary of the National Mediation Board. As requested, the affidavit discusses the effect of Shaw's disqualification on the election by the National Mediation Board on this case.

We will be glad to furnish the Court with any additional information that it may request.

Yours very truly,

ALLAN GERSON
Attorney
Appellate Section, Civil Division

Enclosures

cc: Mr. John R. Phillips
510 Hubbell Building
Des Moines, Iowa 50309

Mr. Roland Wilder, Jr.
25 Louisiana Ave., N.W.
Washington, D.C. 20001

AFFIDAVIT

City of Washington
District of Columbia } ss.

Rowland K. Quinn, Jr. being duly sworn deposes and says:

I am the Executive Secretary of the National Mediation Board (NMB) and as part of my official duties I have custody of the NMB's files and records. I am the same Rowland K. Quinn, Jr. who previously submitted an affidavit in this case (App. pp. 34-48). This affidavit is submitted in response to this Court's request of January 25, 1978, for certification of the ballot count before and after the disqualification of William Shaw, a former employee of Appellant, from voting in an NMB election among Appellant's Pilots and Co-Pilots which resulted in the certification of Intervenor as the collective bargaining representative of these employees.

1. The ballot utilized in the election is identical in form to the NMB ballot specifically approved by the Supreme Court in *Brotherhood of Railway, Airline & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 656, 657, 668-671 (1965). The ballot (attachment A hereto) contained instructions to voters that "If less than a majority of the employees [eligible to vote] cast valid ballots, no representative will be certified", thus treating the failure to cast a ballot as a vote against representation by the Intervenor.

2. The results of the ballot count prior to Shaw's disqualification showed the following:

Number of eligible voters	59
Void ballots	0
Votes cast for Intervenor	30
Valid votes counted	30

3. The results of the ballot count following Shaw's disqualification showed the following:

Number of eligible voters	58
Void ballots	0
Votes cast for Intervenor	30
Valid votes counted	30

4. As the NMB noted to the Appellant when the NMB sustained the objection to Shaw's eligibility (App. p. 47), Shaw did not cast a ballot in the election. Therefore, the fact that Shaw was subsequently struck from the list of eligible voters did not change the outcome of the election. In fact, it only increased the Intervenor's margin of victory. Because Shaw's disqualification decreased the number of eligible voters from 59 to 58, the final tally of votes for the Intervenor became 30 out of 58, rather than 30 out of 59. Accordingly, the NMB had no basis for disturbing its certification of the Intervenor and declined Appellant's request to do so.

/s/ ROWLAND K. QUINN, JR.
Executive Secretary

Subscribed and sworn to before me this 6th day of February, 1978.

Mary Catherine Price
Notary

My Commission Expires May 14, 1981

United States of America

Official Ballot of National Mediation Board

Case No. R-4595

Involving Employees of
Sedalia, Marshall, Boonville Stage Line

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act. The National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized for purposes of the Railway Labor Act.

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified.

If you desire to be represented by:

International Brotherhood of Teamsters
Mark an "X" in this square ..... ☐

If you desire to be represented by:

ANY OTHER ORGANIZATION OR INDIVIDUAL

Write name of such organization or individual on the line below:

....., AND

Mark an "X" in this square ..... ☐

NOTICE

1. This is a SECRET BALLOT. DO NOT SIGN YOUR NAME.

2. Marks in more than one square make ballot void.

3. Do not cut, mutilate or otherwise spoil this ballot. If you should accidentally do so, you may return the spoiled ballot at once to the Mediator and obtain a new one.